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No. 01-1829

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DELTA AIR LINES, INC.,

Petitioner,

—v.—

PENNY FERRIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Whatever else might be said about the Second Circuit's decision in this case, one thing is certain. The court has *not* simply engaged in a logical expansion of prior Title VII precedent. It has, instead, significantly expanded hostile work environment law under Title VII and put employers on notice that they need to monitor and investigate the off-duty personal conduct of their employees to avoid Title VII liability. It also has put employees on notice that they must subordinate substantial zones of their personal privacy to the investigatory needs of their employers at the risk of summary termination of their employment should they fail to do so.

The Second Circuit has created these results by holding that employers can be liable for sexual harassment *under Title VII* for the off-duty actions of their non-supervisory employees, *even in the absence of any sexual conduct in the workplace*. More specifically, the Court has held that Delta may be liable for actions that its Flight Attendant, Michael Young, allegedly took while drinking wine in his personal hotel room during a purely social visit with his co-worker Penny Ferris. Delta's responsibility, according to the court, stems solely from its alleged failure to investigate reports of alleged assaults that Mr. Young may have committed several years before while he was engaged in purely social activities in his own home and in a private hotel room far from any city to which Delta flies. In other words, Delta is potentially liable under Title VII—an employment discrimination statute—despite the indisputable fact that Mr. Young *never* did *anything* sexually

inappropriate in the workplace.[1] No Court has ever adopted such a principle, or anything close to it.

Delta has previously demonstrated in its Petition for Certiorari that Mr. Young's private layover hotel room—which Ms. Ferris admittedly entered to eat and drink alcohol with him for purely social reasons wholly unrelated to Delta—was not part of her work environment for purposes of Title VII.[2] The Second Circuit held, how-

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[1] The closest Plaintiff comes to an allegation of inappropriate sexual conduct in the workplace is her claim that Mr. Young sent "threatening e-mail messages, using Delta's e-mail system" to Aileen Cori Feingold. (Respondent's Brief, p. 5) In fact, however, it is undisputed that the e-mail messages were both non-sexual and non-threatening. Ms. Feingold could not identify anything that was even remotely "sexual" in the workplace e-mails, and the "threatening" aspects of the e-mail, according to Mr. Feingold, was the use of language that Ms. Feingold found "weird" (like the phrase "talking smack").

Plaintiff also alleges, without support, that Mr. Young engaged in sexual harassment of another Flight Attendant, Michelle Zachry, in the workplace. (Respondent's Brief, p. 7) But the only thing that Mr. Young did with respect to Ms. Zachry in the workplace was twice yell at her in an "intimidating" fashion (primarily because she was gossiping about him) and said that he was going to "get her" if she continued to talk about him.

[2] Plaintiff disputes this in her Brief in Opposition, and argues that "[t]he Second Circuit correctly defined Delta's work environment to include those locations that the airline could reasonably foresee that its flight attendants would congregate in." (Respondent's Brief, p. 12) This argument itself demonstrates the breathtaking sweep of the Second Circuit's decision. If Plaintiff and the Second Circuit are correct that a "workplace" under Title VII is defined by the "forseeability of gathering," employers now will be liable for conduct by non-supervisors that occurs in a host of non-work related locations. It is certainly foreseeable that employees will gather in restaurants, bars and even each other's homes. Nevertheless, no Court ever has held that an employer is liable for non-supervisory conduct that occurs in a location that the employer cannot even enter, much less meaningfully control. And certainly no Court (until, apparently, the Second Circuit) has

ever, that not only was this private social encounter a part of Ms. Ferris' work environment, but that Delta may be held liable for Mr. Young's actions in the hotel room *despite the fact that it was indisputably the first alleged sexual misconduct by Mr. Young that ever occurred anywhere near a Delta work environment.* Delta is potentially liable, according to the Second Circuit, because it did not investigate and monitor Mr. Young's previous, off-duty dating behavior.

Holding Delta, or any employer, liable simply because it did not investigate reports of an employee's alleged off-duty sexual misconduct dramatically expands the reach of Title VII.[3] It fundamentally alters the widely recognized "general proposition," cited by Judge Weinstein in the District Court, that "employers are not responsible under Title VII for hostile sexual acts resulting from non-work-related, off-duty interactions between

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ever held employers liable for failing to address non-supervisory social conduct that occurred in an employee's private home or private bedroom.

[3] Plaintiff argues in her Brief in Opposition Delta has misrepresented the alleged off-duty misconduct of Mr. Young as it relates to Kathleen Ballweg and Aileen Feingold, and that each of these women testified to an unequivocal rape by Mr. Young. (Brief in Opposition, p. 3) This is incorrect. Delta's description of the record was both accurate and precise. The bottom line is that, in Ms. Ballweg's case, she consensually shared a bed with Mr. Young and (at least initially) did not resist his advances. In Ms. Feingold's case, she consensually went to sleep in Mr. Young's bed, and when he made physical advances toward her, she made no physical objections, and the only verbal objection she made was that she was not interested in playing "this game."

Despite these descriptions by Ms. Ballweg and Ms. Feingold, Plaintiff would hold Delta liable in this case for not fully investigating these ambiguous, off-duty, off-premises encounters and disciplining or terminating Mr. Young despite his certain protestations of innocence.

co-employees." (*Id.* at 29a) It also turns the nation's primary *employment discrimination* statute into a general tort liability law, under which employers have a duty to investigate any allegations of private sexual improprieties (including, presumably, allegations of spousal abuse, or, as in this case, date rape) no matter how far removed the reported incident is from the workplace. The imposition of these duties constitutes an unprecedented expansion of Title VII, and one of significant importance to employers and employees alike.[4]

Ms. Ferris herself implicitly acknowledges that the Second Circuit essentially has re-invented Title VII. According to her Brief in Opposition, the court's interpretation of Title VII requires that:

> Once Delta knew that Young presented a risk of danger to its female employees it was charged under Title VII to take prompt and remedial action to remedy this known danger and to prevent future harm to other potential victims.

(Brief in Opposition, p. 22) Until now, employers' obligations under Title VII have been to identify and eliminate sex discrimination in the workplace, not to comprehensively protect female employees from danger or harm, and not to compensate them for all dangers that might befall them from co-workers, customers or other members of the general public. If Title VII now imposes this parental-like general obligation to safeguard female

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[4] To state the obvious, under the Second Circuit's reading of the law, Delta is now required to investigate and take action any time there is a complaint about a private date between any two of its tens-of-thousands of employees and to take some undefined action against the accused employee if there is even a question about the propriety of the employee's behavior during the date. The time, energy and money that this obligation requires easily could exceed that required for all of Delta's other Human Resources functions.

employees inside and outside the workplace, it carries with it, in the words of Judge Weinstein, "unacceptable inquisitorial snooping and intrusiveness by employers into the private lives of their employees, contrary to fundamental American notions of privacy." (*Id.* at 22a) The Second Circuit's decision, simply put, fundamentally alters the employer-employee relationship by opening the private sexual conduct of employees to regulation, inquiry and investigation by their employers.

Finally, Ms. Ferris suggests that, even if Title VII *has* been expanded here (and there really can be no doubt on this point), the expansion turns on a unique set of circumstances peculiar to the airline industry and to the circumstances surrounding international layovers. As is evident from the discussion above, however, this assertion simply is wrong. It is quite common in *all* industries for non-supervisory employees to "frolic and detour" into social engagements, not only while they are away from home on the business of their employer, but also when they are working in their home cities and towns. Whether in layover hotel beds, or in airport bars, after hours drinking establishments, or private homes, the Second Circuit's decision effectively stretches the umbrella of Title VII over all "foreseeable" personal frolics and detours. The notion that employers are now responsible for monitoring the private lives of their employees in such contexts is of significant importance to *all* employers (and all employees as well), not just employers in the airline industry.

Notwithstanding, Ms. Ferris' illogical attempts to downplay the decision as airline-specific, the Second Circuit's holding—that Delta may be liable for an alleged assault on Ms. Ferris solely because Michael Young had been alleged to have behaved inappropriately

on previous dates in private quarters several years earlier—changes the purpose and dramatically expands the scope of Title VII. Review by this Court is necessary to preserve the proper focus of the Act, to eliminate the manifest risk to personal privacy that the decision creates, and to resolve a split in the circuits on the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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